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No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M. C. STAMM, ROBERT C. STAMM,

Petitioners,

v.

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A. J. YORKE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Whether a plaintiff, in order to state a claim under 18 U.S.C. §1964(c), commonly known as "civil RICO" must allege a "separate, distinct racketeering enterprise injury", above and beyond the injury caused by the predicate acts of racketeering activity?

2. Whether engrafting upon RICO a non-statutory, judicially-created threshold pleading requirement that there be an allegation of a "separate, distinct racketeering enterprise injury" is an unwarranted and unconstitutional intrusion into the legislative process?

Parties to the Action

Petitioners constitute the four plaintiffs who were appellants in the Court of Appeals for the Second Circuit. Originally, there were seven plaintiffs in the District Court for the Southern District of New York. The other three plaintiffs, in addition to petitioners, were Aaron J. Furman, Alvin Katz and Francis P. Maglio. These latter three individuals were not parties to the proceedings in the Court of Appeals for the Second Circuit. The respondents, set forth in the caption of the case in this Court, constitute all the defendants below, both in the Court of Appeals and in the District Court.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Martin J. Joel, Jr., Harvey Sheid, Everard M. C. Stamm and Robert C. Stamm, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 27, 1984.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, reported at —— F.2d ——, is reproduced at App. A. The decision of the District Court, reported at 578 F. Supp. 1535 (S.D.N.Y. 1984) is reproduced at App. B.

Statement of Jurisdictional Grounds

The judgment of the Court of Appeals (App. C) was entered on July 27, 1984 [at — A.M.]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Statutory Provisions Involved

The pertinent provisions of the Racketeering Influenced and Corrupt Organization Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961 through 1968 are reproduced at App. D.

Focusing upon the language of the RICO statute directly pertinent to the questions presented for review:

> Section 1964(c) expressly provides a private civil remedy to persons injured by RICO's proscribed activity:
>
> > "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee".

In their complaint, Petitioners allege injury to their business and property by reason of the respondents' violation of §1962(c). Section 1962(c) provides:

> "It shall be unlawful for any person employed by or associated with any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

"Racketeering activity" is defined in §1961(1)(B) to include "any act which is indictable" under 18 U.S.C. "section 1341 (relating to mail fraud) [and] section 1343 (relating to wire fraud)." A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity." 18 U.S.C. §1961(5).

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* An "enterprise" is defined in 18 U.S.C. §1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ."

Statement

In this Court, as in the proceedings below, the allegations of the Complaint must be accepted as true. Petitioners, and respondents, were all general partners in the brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns"). Petitioners commenced this action under 18 U.S.C. §1964(c) to recover money damages suffered as a result of respondents' operation of Bruns through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c). Petitioners meticulously alleged each element of a violation of §1962(c). (App. A and B)

The civil RICO claim alleges that Bruns constituted an "enterprise" under 18 U.S.C. §1961(4); that respondents Rea and Coleman, the managing directors of Bruns, and in conjunction with the other respondents, comprised the executive committee which formulated Bruns' policies, exercised exclusive control over its affairs, and negotiated the sale of substantially all of the assets of Bruns to Bache Halsey Stuart Shields, Inc. ("Bache"). By virtue of their positions, respondents "conducted and participated in the affairs" of Bruns within the meaning of §1962(c). (App. A, pp. 3a-4a) The respondents engaged in a fraudulent scheme of misrepresentations and concealments during their negotiations with Bache; they conducted Bruns' affairs through a "pattern of racketeering activity", as that term is used in §1962(c); and as part of the pattern of racketeering activity and in the course of execution of their fraudulent scheme, respondents committed the predicate acts of using mail and wire facilities in violation of 18 U.S.C. §§1341 and 1343.* (App. A, pp. 4a, 7a-8a) The negotiation, execution and consummation of respondents' fraudulent scheme to sell the assets of Bruns, in violation

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* The record below reflects numerous instances of mail and wire activity in violation of RICO. (JA 21-22; and p. 26a of App. B) All references to JA refer to the Joint Appendix filed in the Court of Appeals.

of 18 U.S.C. §§1341 and 1343 was studded with conduct which elicited the following comments by the *unanimous* panel below:

> "[F]raud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, constitutes a 'pattern of racketeering activity'. And when that pattern is used to conduct the affairs of an 'enterprise', congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the [respondents'] conduct." (App. A, p. 11a)

Petitioners' complaint alleges that only after Bruns could no longer be restored to its prior status as a vibrant, ongoing business (JA 20) and thus "too late in the sale negotiations to help" petitioners (App. A, p. 3a), did respondents first reveal to petitioners that Bache had refused to complete the sale unless each partner of Bruns, including the petitioners, signed the purchase agreement. (JA 20) Also unbeknownst to petitioners, respondents Rea and Coleman made illicit substantial payoffs to the members of the executive committee to ensure that they would not disclose to petitioners that petitioners' consent was necessary to consummate the deal. (JA 11-12) These payments had another unlawful design: they were calculated to induce the recipients who previously opposed the sale as not in the best interests of the partnership to consent to the proposed transaction with Bache. (JA 12) These payments facilitated and effected a transaction which respondents knew were not in the best interests of petitioners, but from which Rea and Coleman, as managing directors, and the remaining respondents, stood to realize enormous gain. (JA 12)

In consideration of the secret illicit payoffs, the respondents misrepresented:

(a) that the transaction, as negotiated with Bache, was final and unalterable, while simultaneously respondents were negotiating for themselves "sweetheart" employment arrangements with Bache (App. A, p. 4a); and

(b) that it was impossible to consider better terms from other available alternative purchasers of Bruns' assets. In particular, as noted by Judge Pratt below, respondents made no effort to explore the merits of another offer from Gruntal & Co., a brokerage firm, to buy Bruns. (App. A, p. 4a)

Petitioners were injured in their business and property by reason of the unlawful activity alleged in the complaint, in that, *inter alia,* (1) had they been aware from the beginning that their consent was necessary to consummate the sale to Bache, they would have been able to bargain for and receive sums comparable to those received by members of the executive committee from Rea and Coleman; (2) these payments caused the committee members receiving them to refrain from seeking a higher price from an alternate purchaser; (3) had respondents negotiated in good faith on behalf of all the partners, instead of just themselves, each petitioner could have obtained employment arrangements superior to those that they actually received; and (4) the consideration Bache paid to the partnership was substantially reduced, because Bache absorbed the cost of funding the lucrative employment arrangements negotiated by respondents for themselves. (App. A, pp. 4a-5a)

In sum, petitioners' allegations are precisely what the RICO statute requires. The District Judge found that the petitioners had alleged all the necessary elements of the violation of 18 U.S.C. §1962(c). (App. B, p. 26a) Nonetheless, the District Court, with sparse comment, granted a motion to dismiss the petitioners' complaint on the sole ground that in order to maintain a RICO action under

§1964(c), it was incumbent upon petitioners to allege a "separate, distinct racketeering enterprise injury". (App. B, p. 32a) No attempt was made by the Judge to supply even an iota of definition or clarification of this facially confusing verbiage. Petitioners appealed, and the disposition below was, to say the least, bizarre. In a unanimous opinion of some nineteen pages (App. A), the three judge panel was firmly convinced that the District Judge had erred in dismissing petitioners' complaint.* They stressed that neither the language of the RICO statute nor its legislative history imposed the artificial requirement of a "separate, distinct racketeering enterprise injury" invoked by the District Judge. The panel further unanimously stressed that in dismissing the complaint, through the artifice of judicially creating a standing requirement, the District Judge had invaded the province of Congress in rewriting RICO's provisions in order to restrict its application. Unanimously convinced of the error in dismissing the petitioners' complaint, and unanimously convinced of the correctness of its own analysis of the law, the panel below felt compelled to uphold the dismissal of petitioners' complaint because of the majority opinions in two cases which had been filed 24 and 48 hours previously. These cases are *Sedima, S.P.R.L.* v. *Imrex Co., Inc.* (2d Cir., decided July 25, 1984) and *Bankers Trust Co.* v. *Daniel Rhoades, et al.* (2d Cir., decided July 26, 1984). The opinion in our case notes:

> "[T]he opinions were filed, by agreement of the court, in the order in which they were completed. We publish this opinion to express our disagreement with the majority views of the panels in those two cases and to reaffirm the views expressed by Judge Cardamone in his dissents in *Sedima, S.P.R.L.*, and *Bankers Trust*

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* The panel explicitly stated: "We therefore conclude that the district court erred when it dismissed plaintiffs' complaint for failing to allege a 'separate, distinct racketeering enterprise injury'". (App. A, p. 19a)

> *Co.* This opinion will also serve as a record of the dissents by Judge Cardamone and Judge Pratt to this circuit's denial of in banc consideration to *Sedima, S.P.R.L., Bankers Trust Co.*, and the instant case. Without necessarily accepting the rationale of this opinion, Judge Winter also dissents from the denial of in banc consideration . . ." (App. A, p. 3a)

Judge Pratt's opinion for the unanimous panel in our case is virtually a point-by-point rebuttal of the views expressed in the majority opinions in *Bankers Trust* and *Sedima*. And our panel had even gone to the lengths of adopting and reaffirming the cogent views expressed by Judge Cardamone who was the dissenter in both *Sedima* and *Bankers Trust*.

We thus have the rather unusual situation that petitioners were the only plaintiffs in the trilogy of cases who had achieved a unanimous opinion in their favor. Yet, they were denied the reversal of the District Court's judgment to which they were clearly entitled because the *Sedima* and *Bankers Trust* opinions had beaten Judge Pratt's opinion in a race for filing.

Reasons for Granting the Writ

With all respect, there are at least four special and important reasons supporting a review on writ of certiorari:

1. The disposition by the Court of Appeals (in contrast to its actual opinion) is in direct conflict with decisions of the Fifth, Seventh and Eighth Circuit Courts of Appeals, which have firmly rejected the creation of a special injury requirement.

The Second Circuit's "distinct" injury requirement, which it has superimposed as an artificial gloss on the RICO statute, finds no support in the statute, nor in its legislative history. The other Circuits have given RICO the plain reading that its unambiguous language mandates, particularly when supported by the legislative history, and have

refused to devise the slippery concept of a racketeering enterprise injury which does violence to the statutory prerequisites that Congress established for a RICO cause of action. Indeed, the conflict between the Circuits is sharpened by the unanimous opinion in our case, which in essence invites the other circuits to reject *Sedima* and *Bankers Trust,* by which the panel in our case felt bound.

The internecine warfare between *Sedima, Bankers Trust* and our case, at the Second Circuit level, has focused attention upon the need of a decision by this Honorable Court that may put an end to the battle that has been raging among the lower federal courts as to the scope of civil RICO.*

2. The Court of Appeals below has decided an important question of federal law which has not been, but we respectfully urge should be, settled by this Court. The civil remedy to victims of RICO violations provided in 18 U.S.C. §1964(c) has never before been considered by this Court. The opinion below, in our case, had stressed that the creation of a requirement for standing of a "racketeering enterprise injury" is "to sterilize civil RICO as a weapon against the conduct congress sought to curtail." (App. A, p. 11a) Such a limitation of RICO standing "not only would run counter to the intent expressed by Congress when it enacted RICO, but also would 'lead to the anomalous result of denying standing to direct victims of racketeering activity.'" (App. A, p. 17a)

We cannot improve upon Judge Pratt's opinion in our case, nor the two cogent dissents by Judge Cardamone in

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* The issue of the *National Law Journal,* dated August 13, 1984, at p. 1, column 3, highlighted the dissension within the Second Circuit and the furor without created by our case [captioned below as *Furman* v. *Cirrito*] and *Sedima* and *Bankers Trust:*

"A RICO Crisis—2nd Circuit Rulings Sharply Curb Civil Actions; Lawyers See Confusion Until High Court Acts."

The *New York Law Journal,* on July 31, 1984, front paged:

"Circuit Court Panel Opposes Earlier Rulings in RICO Cases".

Sedima and *Bankers Trust** (adopted in entirety by all three judges in our case) which have focused upon the far-reaching impact of a judicial revision of civil RICO conditioning standing upon a "separate, distinct racketeering enterprise injury." The issue is one of national significance. The important Congressional goals underlying civil RICO are put in jeopardy by the gravamen of the judgment below.

3. It is not part of the judicial function to limit the express language of civil RICO by judicial fiat. The artificial standing requirement of a "separate, distinct racketeering enterprise injury" is nothing less than impermissible judicial legislation. Again, Judge Pratt's opinion makes the point most lucidly. The language of §1964(c) is clear. It interdicts any such judicially-created artifice. (App. A, pp. 9a-10a, 18a) It is not the judiciary's proper role to superimpose additional requirements for establishing a RICO claim on what is a clearly delineated statutory cause of action.

We submit that a writ is warranted so that this Honorable Court can re-establish the separation of powers that is challenged by the disposition below.

4. Petitioners are in the amazing position of asking this Honorable Court to review a judgment where the opinion below is in full support of petitioners' pleaded case. All three judges on the panel below believed so strongly in their views (and in the sufficiency of petitioners' civil RICO claim) that they took the extraordinary route of publishing a full and forceful opinion. (App. A) In this setting, it is not an exaggeration to suggest that the panel below filed its opinion so as to underscore the compelling need for a writ of certiorari in this case.

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* Separate petitions for a writ of certiorari to review the judgments in *Sedima* and *Bankers Trust* are being filed contemporaneously with this petition.

Amplification of Reasons Why a Writ Should Be Granted

1. The Second Circuit panel in our case found the RICO statute to have been carefully drafted, and an accurate study of its legislative history (traced in the opinion, App. A, pp. 9a-10a, 13a-17a) reinforced the clarity—and controlling effect—of Congress' unambiguous language in upholding petitioners' complaint. See *United States* v. *Turkette,* 452 U.S. 576, 580 (1981). Typifying its close analysis, our panel stated (App. A, at p. 9a)

> "To us, the language of §1964(c) is clear. It contains no requirement for a 'racketeering enterprise injury'; nor does it limit the protected injury to one sustained 'by reason of' the racketeering enterprise; it grants civil relief for 'injury', which logically includes *any* injury, 'by reason of a violation of §1964'." (emphasis by the Court)

Sedima and *Bankers Trust,* however, were at odds with our panel's opinion, and even with each other. In *Sedima,* a divided panel held that, in order to state a civil RICO claim, a plaintiff must allege a "racketeering injury" which it defined as including an "injury different in kind from that occurring as a result of the predicate acts themselves". The *Sedima* panel then specifically held that its self-styled "racketeering injury" occurs only where "mobsters", either through legitimate or illegitimate businesses "cause systemic harm to competition and the market, and thereby injure investors and competitors." (App. A, p. 8a, quoting from *Sedima*)

In *Bankers Trust,* a divided panel departed from *Sedima,* while generating its own version of threshold standing to sue under §1964(c). The *Bankers Trust* panel held that a civil RICO complaint is legally insufficient without an allegation of a "distinct RICO injury"; i.e., an allegation of some kind of "proprietary injury" caused by a defendant's

use of a pattern of racketeering activity in connection with a RICO enterprise, as opposed to an injury caused merely by the individual racketeering acts. (App. A, p. 8a, discussing *Bankers Trust*)

The panel below, in our case, felt compelled to surrender its own carefully reasoned views and to defer to the "authority" of *Sedima* and *Bankers Trust*. (App. A, p. 19a)

Although in disarray with their differing opinions, the Second Circuit has fashioned a harmony of judgments which, for all practical purposes, has repealed RICO's private civil remedy in the Second Circuit.

The Second Circuit's position is in unmistakable conflict with the decisions of at least three other federal courts of appeals which have rejected the creation of a special injury requirement.

We refer to *Schacht* v. *Brown*, 711 F.2d 1343, 1358 (7th Cir. 1983), *cert. denied* 104 S.Ct. 509 (1983) ("[W]e believe, like most other courts, that the erection of a 'competitive' or 'indirect' injury barrier to RICO recovery comports with neither the plain language nor the central goal of the statute"); *Sutliff, Inc.* v. *Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984) ("[A]s allegedly intended victims of the scheme the plaintiffs were injured in their business or property by reason of the alleged violations . . . section 1964 is also satisfied, which completes the elements of a RICO damage claim"); *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1287-88 (7th Cir. 1983); *Alcorn County* v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984) (rejecting a special injury test, and holding that plaintiffs could sue for injuries flowing from the predicate acts of racketeering activity); *Bennett* v. *Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *adopted*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, 104 S.Ct. 509 (1983).

The Second Circuit's trilogy on July 25, July 26 and July 27, 1984 (*Sedima, Bankers Trust* and *Furman* v.

Cirrito) has contributed to bafflement in other Circuits in trying to unravel and search for coherency in the internal conflict. Thus, in *Alexander Grant and Company* v. *Tiffany Industries, Inc.*, No. 83-1608 (8th Cir. August 22, 1984) the Eighth Circuit, criticizing the notion of a "racketeering enterprise injury" as "a slippery concept whose definition has eluded even those courts professing to recognize it", rejected *Sedima*, found that on the facts, Alexander Grant's complaint would have passed muster even under the *Bankers Trust* injury test (which it described as "far narrower" than its own) and cited, with apparent approval, *Furman* v. *Cirrito*, which it described as "criticizing the requirement of a racketeering enterprise injury imposed by *Sedima* and *Bankers Trust*" (No. 83-1608, slip op. at 10-11).

Patently, this case presents a critical issue which has thrown the Circuits into turmoil.

2. The basis of the judgment below makes civil RICO an empty shell. It emasculates RICO's major purpose—to strike a mortal blow against the property interests of racketeers—and, it would place whole areas of racketeering activity beyond the expansive reach of the statute. As observed in *Russello* v. *U.S.*, —— U.S. ——, 78 L.Ed.2d 17, 104 S.Ct. 296 (Nov. 1, 1983), Congress throughout RICO utilized terms and concepts of breadth, in its statement of findings and purpose speaks of "new remedies" (clearly indicating an intent to add to existing remedies), and specifically directed that RICO "shall be liberally construed to effectuate its remedial purposes". Section 904(a) of Public Law 91-452, 84 Stat. 947 (1970).

The Second Circuit, in adjudging that persons who suffered injury directly from racketeering activity in violation of §1962 cannot recover in the absence of a "separate, distinct racketeering enterprise injury" or some nebulous kind of "proprietary injury", is leaving money derived from actions prohibited by RICO precisely where Congress

did not intend it to remain, in the hands of RICO violators. The Second Circuit's ruling makes a mockery of §1964(c). For example, who would have standing to sue a group of racketeers who are engaged in a pattern of arson-for-profit? The gangsters' competitors? Under the Second Circuit yardstick, inexorably the direct victims of the arson would not have standing to sue, inasmuch as they were injured only by the predicate acts of arson. And the defrauded insurance company would not have standing to sue because there would be no injury above and beyond that caused by the underlying arson fraud. And who would have standing to bring a RICO action against a group of racketeers who are engaged in loan sharking? A commercial bank? A brokerage firm infiltrated by organized crime and engaged in defrauding its customers might injure no one but the customers. There would thus be no injury above and beyond that caused by the predicate acts of fraud forming the "pattern of racketeering activity". Are the direct victims of the fraud to be denied any standing to sue, and are the culprits thereby rendered wholly immune from civil RICO sanctions? These questions may be asked with respect to the theft and fencing of property, and on *ad infinitum*. Yet, these are "among the very crimes that Congress specifically found to be typical of the crimes committed by persons involved in organized crime," *United States* v. *Turkette, supra,* 452 U.S. at 590, and to which the civil remedy was made applicable.

There is absolutely no warrant for any judge-made rule that direct victims of racketeering activity are unable to use the mechanisms of a statute enacted for their protection.

This Court re-emphasized in *Russello* v. *United States, supra,* that "where the statutory language is unambiguous," and "in the absence of a clearly expressed legislative intent to the contrary," Congress' language "must ordinarily be regarded as conclusive" (78 L.Ed.2d at 16). RICO legislative history is replete with evidence that Congress intended

to provide relief to the direct victims of racketeering activity. We refer for example to: 116 Cong. Rec. 602 (1970) (remarks of Senator Yarborough); Organized Crime Control: Hearings on S.30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 278 (1970) (remarks of Representative Pepper); 116 Cong. Rec. 35201 (1970) (remarks of Representative McCulloch); Measures Relating to Organized Crime: Hearings on S.30, S.974, S.975, S.976, S.1623, S.1624, S.1861, S.2022, S.2122 and S.2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 445 (1969) (statement by President Nixon); 116 Cong. Rec. 603 (1970) (Senator Allot quoting President Nixon's message); 116 Cong. Rec. 600 (1970) (remarks of Senator McClellan). See also the review of legislative history in Blakey,* *The Civil RICO Fraud Action in Context: Reflections on Bennett* v. *Berg,* 58 Notre Dame L. Rev. 237 (1982).

Professor Blakey notes in his summary of Congress' purposes, *Reflections on Bennett* v. *Berg, supra,* 58 Notre Dame L. Rev. at 280, that (a) immediate victims of racketeering activity were contemplated as civil plaintiffs in treble damage suits; (b) Congress was acutely aware that it was creating new federal remedies for acts traditionally viewed as common law fraud; and (c) the civil remedy was deliberately redrafted so as to *exclude* the "special injury" concept fashioned by the Second Circuit:

> "[A]ny suggestion that RICO actions be limited by anti-trust limitations—'competitive', 'commercial', or 'direct/indirect' injuries—flies in the face of the very consideration that led to the drafting of RICO as a separate statute from the anti-trust statutes that are so limited."

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* Professor G. Robert Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970, when RICO was processed.

Reflections on Bennett v. *Berg, supra,* 58 Notre Dame L. Rev. at 255 n.52.

Judge Pratt's opinion below also provides a detailed exposition shattering any pretense that antitrust analogies can somehow provide a shred of substantive support for the spurious concept of a "racketeering enterprise injury". (App. A, pp. 14a-17a) We believe Judge Pratt's careful review and scholarly analysis is unanswerable.

All in all, the Second Circuit's position in operative effect virtually reads §1964(c) out of existence. The judgment below is based upon circumvention of the statutory prerequisites that Congress established for a RICO cause of action.

We submit that the judiciary's duty is to administer the law which Congress passed. A writ of certiorari is warranted so as to restore to civil RICO the vitality which Congress intended, and which has been undermined by the judgment below.

3. We respectfully invoke the firm directive of this Court in *United States* v. *Turkette, supra,* 452 U.S. 576, 587 (1980) that the courts are without authority to restrict the application of the RICO statute that Congress clearly mandated. The disposition below judicially amends RICO by eliminating prohibited activities expressly covered by RICO. In establishing an additional court-imposed injury requirement for civil RICO violations in the teeth of the clear language of the RICO statute, the Second Circuit trespassed into Congress' domain and appears to "have been more intent on re-drafting than reading RICO." *Blakey, Reflections on Bennett* v. *Berg, supra,* 58 Notre Dame L. Rev. at 285.

We respectfully submit that it would be constructive and timely for this Court to instruct the lower courts that engrafting upon RICO a non-statutory judicially-created threshold pleading requirement of a "separate, distinct"

injury, above and beyond the injury caused by the predicate acts of racketeering activity, is impermissible judicial legislation. The panel below, in our case, so ruled (App. A, pp. 18a-19a) but was inhibited from basing its judgment upon its own unanimous opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SEYMOUR SHAINSWIT
Attorney for Petitioners
Martin J. Joel, Jr., Harvey Sheid,
Everard M. C. Stamm and
Robert C. Stamm

October, 1984

APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1261—August Term, 1983

Argued: May 16, 1984 Decided: July 27, 1984

Docket No. 84-7113

AARON J. FURMAN, ALVIN KATZ, FRANCIS P. MAGLIO, MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM,

Plaintiffs,

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM,

Plaintiffs-Appellants,

—against—

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A.J. YORKE,

Defendants-Appellees.

Before:

CARDAMONE, PRATT, and HON. DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation, *Circuit Judges,*

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, dismissing plaintiffs' civil claim under the Racketeer In-

fluenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982), for failure to allege a "separate, distinct racketeering enterprise injury".

Affirmed on the authority of *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 83-7965, slip op. at —— (2d Cir. ——, 1984), and *Bankers Trust Co.* v. *Rhoades*, No. 83-7636, slip op. at —— (2d Cir. ——, 1984).

SEYMOUR SHAINSWIT, New York, N.Y. (Melanie L. Golden, Kronish, Lieb, Shainswit, Weiner & Hellman, New York, N.Y., of Counsel), *for Plaintiffs-Appellants.*

MAX GITTER, New York, N.Y. (William P. Farley, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., of Counsel), for *Defendants-Appellees.*

PRATT, *Circuit Judge:*

The main issue on this appeal is one of considerable importance in view of the rapidly growing number of civil actions based on 18 U.S.C. § 1964(c), commonly known as "civil RICO". That issue is whether a plaintiff, in order to state a claim under § 1964(c), must allege a "separate, distinct racketeering enterprise injury", above and beyond the injury caused by the predicate acts of racketeering activity. Noting that the damage allegations in plaintiffs' RICO cause of action were identical to those in their common law fraud claims, the district court concluded that no "separate, distinct racketeering enterprise injury" had been alleged, that the RICO claim was therefore legally deficient, and, there being no other basis for federal jurisdiction, that the complaint should be dismissed. Although this panel concludes that neither the language of the statute nor its legislative history imposes such a requirement,

we are compelled to affirm the district court's judgment based on the two recently filed, controlling opinions in this court: *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 83-7965, slip op. at —— (2d Cir. ——, 1984), and *Bankers Trust Co.* v. *Rhoades*, No. 83-7636, slip op. at —— (2d Cir. ——, 1984). Both of these cases were argued before the case now before us. The filings of the opinions in all three cases were held up pending a vote by the entire court on a request made within the court for in banc consideration of all three cases. When the in banc request was denied, the opinions were filed, by agreement of the court, in the order in which they were completed. We publish this opinion to express our disagreement with the majority views of the panels in those two cases and to reaffirm the views expressed by Judge Cardamone in his dissents in *Sedima, S.P.R.L.*, and *Bankers Trust Co.* This opinion will also serve as a record of the dissents by Judge Cardamone and Judge Pratt to this circuit's denial of in banc consideration to *Sedima, S.P.R.L.*, *Bankers Trust Co.*, and the instant case. Without necessarily accepting the rationale of this opinion, Judge Winter also dissents from the denial of in banc consideration.

Background

This lawsuit arises out of the sale of the brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns") to Bache, Halsey, Stewart, Shields, Inc. ("Bache"). Plaintiffs and defendants were all general partners of Bruns. Defendants Rea and Coleman were the managing directors of Bruns; the other defendants, along with Rea and Coleman, comprised the executive committee which formulated Bruns's policies, exercised exclusive control over its affairs, and negotiated the sale to Bache.

Plaintiffs allege that until it was too late in the sale negotiations to help them, defendants did not reveal that Bache had refused to complete the sale unless each partner

of Bruns, including the plaintiffs, signed the purchase agreement; that defendants Rea and Coleman made payments, in the form of severance pay, to the other members of the executive committee in order to induce certain misrepresentations to plaintiffs; that defendants negotiated for themselves "sweetheart" employment arrangements with Bache, simultaneously misrepresenting to plaintiffs that these arrangements could not be altered; and that defendants made no effort to explore the merits of another offer to buy Bruns.

The complaint sets forth three causes of action, two of which are pendent state law claims based on common law fraud and breach of fiduciary duty. The civil RICO claim asserts that Bruns constituted an "enterprise" under 18 U.S.C. § 1961(4); that by virtue of their positions defendants "conducted and participated in the affairs" of Bruns within the meaning of § 1962(c); that defendants engaged in a fraudulent scheme of misrepresentations and concealments during their negotiations with Bache; that defendants conducted Brun's affairs through "a pattern of racketeering activity", as that term is used in § 1962(c); and that, as part of the pattern of racketeering activity and in furtherance of the fraudulent scheme, defendants committed the predicate acts of using mail and wire facilities in violation of 18 U.S.C. §§ 1341 and 1343.

Plaintiffs allege "injury in their business and property" in that (1) had they been aware from the beginning that their consent was necessary to consummate the sale to Bache, they would have been able to bargain for and receive sums comparable to those received by members of the executive committee from Rea and Coleman; (2) these payments caused the committee members receiving them to refrain from seeking a higher price from an alternate purchaser; (3) had defendants negotiated in good faith on behalf of all the partners, instead of just themselves, each plaintiff could have obtained employment arrangements

superior to those that they actually received; and (4) the consideration Bache paid to the partnership was substantially reduced, because Bache absorbed the cost of funding the lucrative employment arrangements negotiated by defendants for themselves. Plaintiffs seek the treble damages and attorney's fees authorized by 18 U.S.C. § 1964(c).

Defendants moved in the district court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Alternatively, they sought an order compelling plaintiffs to arbitrate the controversy as provided in the partnership agreement. The district court rejected most of defendants' arguments: it concluded that, on the allegations of the complaint, Bruns was an "enterprise", that the sale to Bache was part of the "affairs" of the enterprise, and that defendants had engaged in a "pattern of racketeering activity", all within the meaning of those terms in the RICO statute. However, on the sole ground that plaintiffs were required, but failed, to allege "a separate, distinct racketeering enterprise injury", the district court dismissed the complaint. It did not reach the arbitration question.

On appeal, therefore, we are presented with the narrow issue of whether, in order to state a claim under § 1964(c), a plaintiff must allege "a separate, distinct racketeering enterprise injury". We are *not* considering whether plaintiffs must allege a connection to organized crime, *cf. Moss* v. *Morgan Stanley,* 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied,* 104 S.Ct. 1280 (1984), whether plaintiffs must show some "competitive injury" as a result of defendants' actions, *cf. Schacht* v. *Brown,* 711 F.2d 1343, 1356-58 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 508 (1983); *Bennett* v. *Berg,* 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd in part and rev'd in part on other grounds,* 710 F.2d 1361 (en banc), *cert. denied,* 104 S.Ct. 527 (1983), or whether the statute requires a criminal conviction of the predicate offenses, or of a RICO offense, before a civil RICO claim can be main-

tained, *see Sedima, S.P.R.L.* v. *Imrex Co.*, slip op. at ——; *cf. USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *Farmers Bank of Delaware* v. *Bell Mortgage Corp.*, 452 F.Supp. 1278, 1280 (D. Del. 1978).

DISCUSSION

In 1970 congress enacted the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941. Title IX thereof, codified at 18 U.S.C. §§ 1961-68, is entitled "Racketeer Influenced and Corrupt Organization Act" (RICO) and prescribes criminal penalties, 18 U.S.C. § 1963, as well as civil remedies, 18 U.S.C. § 1964, for violation of its substantive provisions, 18 U.S.C. § 1962. The case before us concerns the private civil remedies under § 1964(c), particularly treble damages and attorneys fees.

Our analysis must begin with the statutory language. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). If unambiguous that language controls, absent "clearly expressed legislative intent to the contrary". *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). Further, in construing this statute we should keep in mind that congress intended that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970); *see also United States* v. *Turkette*, 452 U.S. at 587.

RICO's private civil remedies are authorized by § 1964(c), which provides:

> Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962(c), the substantive provision that plantiffs claim was violated here, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Congress has carefully defined for us some of the unfamiliar terms it used:

> "[E]nterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. § 1961(4).
>
> "[R]acketeering activity" means [any of a large number of specified acts which are chargeable under state law, indictable under federal law, or constitute an offense under federal bankruptcy, securities, or drug laws]. § 1961(1).
>
> "[P]attern of racketeering activity" requires at least two acts of racketeering activity [within a ten year period]. § 1961(5).

When these provisions and definitions are applied to the instant complaint, it is apparent that plaintiffs have sufficiently alleged those facts required by the statutory language—that they were injured in their business and property by the conduct of the defendants, who violated § 1962 by conducting the enterprise's affairs through a pattern of racketeering activity. The alleged pattern of racketeering activity was a repeated use of the mails and the wires in furtherance of defendants' underlying scheme

to defraud plaintiffs by concealing from them until the last possible moment the true conditions for the sale of Bruns.

The court below, however, construed the phrase "by reason of a violation of § 1962", contained in § 1964(c), as requiring plaintiffs to allege "something more" than injury from defendants' predicate acts of mail and wire fraud. The "something more" was characterized as a "separate, distinct racketeering enterprise injury". The two recent decisions by panels of this court referred to at the beginning of this opinion address this same issue and essentially agree with the district court in this case. In *Sedima, S.P.R.L.* v. *Imrex Co.*, a divided panel of this court held that, in order to state a civil RICO claim, a plaintiff must allege a "racketeering injury" which it defined as including an "injury different in kind from that occurring as a result of the predicate acts themselves". Slip op. at ——. The panel identified such an injury as one "caused by an activity which RICO was designed to deter." *Id.* More specifically, it held that this type of injury occurs only where "mobsters", either through legitimate or illegitimate businesses, "cause systemic harm to competition and the market, and thereby injure investors and competitors." Slip op. at ——.

In *Bankers Trust Co.* v. *Rhoades*, another divided panel of this court held that a civil RICO claim requires an allegation of some kind of "proprietary injury" caused by defendant's use of a pattern of racketeering activity in connection with a RICO enterprise, as opposed to an injury caused merely by the individual racketeering acts. The panel concluded that, without an allegation of this "distinct RICO injury", a civil RICO complaint is legally insufficient. Slip op. at ——. In addition to this circuit's recent decisions, some district courts have imposed a similar restriction on civil RICO, sometimes in the form of a "standing" requirement, *e.g., Dakis on behalf of the*

Dakis Pension Plan v. *Chapman,* 574 F. Supp. 757, 761 (N.D. Cal. 1983); *Barker* v. *Underwriters at Lloyd's London,* 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Johnsen* v. *Rogers,* 551 F. Supp. 281, 284-85 (C.D. Cal. 1982); *Harper* v. *New Japan Securities International, Inc.,* 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Alton* v. *Alton,* No. 82 Civ. 0795, slip. op. at 5-6 (S.D.N.Y. July 9, 1982), *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981), but other district courts have rejected such a restriction, *see, e.g., Wilcox* v. *Ho-Wing Sit,* No. C-84-0615-WWS, slip op. at 17-18 (N.D. Cal. May 3, 1984)); *Ralston* v. *Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Mauriber* v. *Shearson/American Express, Inc.,* 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983); *Seville Industrial Machinery Corp.* v. *Southmost Machinery Corp.,* 567 F. Supp. 1146, 1157 (D. N.J. 1983); *Eisenberg* v. *Gagnon,* 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates, Inc.* v. *Greenfeld,* 564 F. Supp. 273, 278-79 (D. Md. 1983).

To us, the language of § 1964(c) is clear. It contains no requirement for a "racketeering enterprise injury"; nor does it limit the protected injury to one sustained "by reason of" the racketeering enterprise; it grants civil relief for "injury", which logically includes *any* injury, "by reason of a violation of § 1962".

Despite the clarity of congress's language, defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is directed only against "racketeers" such as hoodlums and thugs, and not against businessmen engaged in "garden variety fraud", as alleged in this case. However, defendants and others who advocate this position ignore the larger purposes of RICO. While RICO's primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society, *see* Statement of Findings and Purpose, Organized Crime Control

Act of 1970, 84 Stat. 922-23 (1970); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg,* 58 Notre Dame L. Rev. 237, 245-48 (1982), which causes billions of dollars in economic loss each year. *Id.* at 342-48. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem. *United States* v. *Turkette,* 452 U.S. at 586.

Thus, in order to deter and help eliminate fraud from interstate commerce, congress included in its § 1961(1) definition of predicate acts of racketeering actvity not only criminal activity which had formerly been "within the police power of the State", thereby essentially federalizing certain specific state crimes, *id.* at 586-87 (citing legislative history), but also the common federal crimes of fraud, such as mail fraud, wire fraud, bankruptcy fraud and securities fraud. Congress was well aware that in so doing, it was altering the federal-state balance in these areas, elevating "garden variety" common law fraud claims to the status of federal offenses, and subjecting violators to enhanced criminal penalties and sevère civil remedies. *Id.* Since congress unquestionably had the power to do this, "the courts are without authority to restrict the application of the statute." *Id.* at 587 (citation omitted). Yet, restriction is precisely what some courts, like defendants and the court below, seek to impose through an artificial standing requirement on plaintiffs who seek relief under § 1964(c).

Further, the statute is not aimed at "racketeers"; indeed, the word "racketeer" is not used in the statute except in its title. Instead, it is aimed at "racketeering", and even then only in the context of "racketeering activity", which congress has defined carefully and precisely in terms of conduct. When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity", it provided no exception for businessmen, for white collar

workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud", we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, constitutes a "pattern of racketeering activity". And when that pattern is used to conduct the affairs of an "enterprise", congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the defendant's conduct.

By construing the "by reason of" language to require more than injury resulting from the predicate acts, courts simply assume that congress could not have intended to provide treble damages and attorneys fees to persons "whose only injury stems directly from the predicate acts." *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. at 107; *see also Johnsen* v. *Rogers*, 551 F. Supp. at 285; *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 208-09. As a practical matter, however, the only injury suffered by an injured party in most cases will flow from the predicate acts; the enterprise is merely the means or vehicle through which those acts are accomplished. To require injury to result from "something more" than the predicate acts is to sterilize civil RICO as a weapon against the conduct congress sought to curtail.

Moreover, it is not true that absent a "racketeering enterprise injury" a claim under § 1964 represents no more than a claim brought under the statutes which define the predicate acts. *United States* v. *Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *cf. Johnsen* v. *Rogers*, 551 F. Supp.

at 285; *North Barrington Development, Inc.* v. *Fanslow,* 547 F. Supp. 207, 211 (N.D. Ill. 1980); *Harper* v. *New Japan Securities International, Inc.,* 545 F. Supp. at 1007-08. What distinguishes a civil RICO claim from an ordinary fraud claim is that RICO requires a "pattern of racketeering activity" (two acts within 10 years) used to conduct the affairs of an "enterprise." *See United States* v. *Forsythe, supra.* The existence of the "enterprise" is a *sine qua non* of a RICO claim, and "at all times remains a separate element which must be proved", *United States* v. *Turkette,* 452 U.S. at 583. By requiring "proof of a fact other than the facts required to prove the predicate acts of racketeering", *Bennett* v. *Berg,* 685 F.2d at 1060, RICO transforms conduct that is already criminal under other statutes into a federal RICO crime with its severe maximum penalties of 20 years in prison and a $25,000 fine. Similarly, with equal force, and for the same deterrent purpose, the statute transforms ordinary common law fraud claims into federal civil RICO claims, with enhanced remedies of treble damages and attorneys fees.

Those district courts, like the one below, which have dismissed complaints for failure to allege a separate and distinct "racketeering enterprise injury", have not provided guidance as to what constitutes such an injury. *See Ralston* v. *Capper,* 569 F. Supp. at 1580. One court has posited that a "racketeering enterprise injury" might occur "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.,* 527 F. Supp. at 209. But this example does little to define a "racketeering enterprise injury", and it does even less in terms of limiting the statute's reach, because almost every defendant's ability to inflict harm on a plaintiff would be enhanced by the fruits of the racketeering activity. It follows then that almost every complaint that alleges a § 1962 violation and

a concomitant injury would satisfy this test. The difficulty in understanding or even defining a "racketeering enterprise injury" is more fully demonstrated in Part III of Judge Cardamone's dissenting opinion in *Bankers Trust Co.* v. *Rhoades,* slip op. at ——.

Defendants and others have decried the use of RICO in "far-reaching civil contexts" where it has the potential to "tarnish the reputations" of ostensibly legitimate businesspersons. We are unmoved by the argument. By defining "racketeering activity" in functional rather than status terms, congress sought to avoid serious constitutional hazards. If defendants are surprised or offended that their "garden variety" fraudulent conduct is now statutorily characterized as "racketeering", they should address their grievance to congress, which clearly and specifically included mail, wire, and securities frauds as predicate acts of "racketeering activity" under § 1961(1). *See also* Blakey, *supra,* at 268-70. Since such conduct is more frequently associated with "white collar" crime than with "organized crime", as those terms are generally used in the everyday world, we conclude that congress wanted RICO to reach, among other illegal conduct, precisely those kinds of activities that are at issue in this case.

The legislative history of Title IX does not support a contrary interpretation of the statute. When it enacted RICO, congress was on notice that the statute had potentially far-ranging effects. Some members of the house who opposed the statute argued:

> Title IX * * * seeks to stymie organized crime's growing infiltration of legitimate business.
>
> But it runs amuck. It embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse.

H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4007, 4081 (dissenting views of Reps. Conyers, Mikva, and Ryan); *see also* 116 Cong. Rec. 35204-05 (1970) (remarks of Rep. Mikva). Despite this opposition, however, congress chose to enact the statute as written, and we would exceed our proper function were we to rewrite its provisions in order to restrict its application. *United States* v. *Turkette,* 452 U.S. at 587.

A few courts have seized upon references to antitrust law in RICO's legislative history, specifically to § 4 of the Clayton Act, 15 U.S.C. § 15, which contains language similar to that in § 1964(c), as evidence that congress, in enacting RICO, intended to impose proof requirements on RICO plaintiffs similar to those imposed on antitrust plaintiffs. *See Johnsen* v. *Rogers,* 551 F. Supp. at 285; *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.,* 527 F. Supp. at 208-09. While RICO's legislative history does contain some references to antitrust principles, attempts to impute the restrictive standing requirements of antitrust law to RICO, based on similar language in both statutes, are flawed.

Section 4 of the Clayton Act, 15 U.S.C. § 15, enables a person "injured in his business or property by reason of anything forbidden in the antitrust laws [to recover treble damages] and the cost of suit, including a reasonable attorney's fee." To recover under this provision, "antitrust injury" must be proved, which is "injury of the type antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1971).

Relying on this language in *Brunswick,* some courts have required that a plaintiff demonstrate a distinct RICO injury in order to state a civil RICO claim. *See Johnsen* v. *Rogers,* 551 F. Supp. at 285 (plaintiff must allege "a commercial injury caused by the conducting of an 'enter-

prise's affairs through a pattern of racketeering activity.' "); *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. at 1007 (plaintiff must allege "injury of the type the RICO statute was intended to prevent"); *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 208. (Although RICO does not require a competitive injury as that term is defined by antitrust cases, plaintiff must allege a "racketeering enterprise injury").

But the antitrust analogy has several defects. While RICO copied the treble damages and attorney's fee language of § 4, this was simply "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff); *see also* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1112 (1982). Moreover, these concepts that were borrowed from the Clayton Act, treble damages and injunctive relief, pertain to remedies rather than what is necessary to establish a claim under RICO.

Senator McClellan, one of the sponsors of the bill, stated:

> There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.
>
> The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill.

115 Cong. Rec. 9567 (1969).

Senator Hruska echoed these remarks:

> Patterned closely after the Sherman Act, [RICO] provides for private treble damage suits, prospective in-

> junctive relief, discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the business man competing with organized crime.

115 Cong. Rec. 6993 (1969).

Moreover, the Antitrust Section of the American Bar Association argued against a proposal which would have amended the Sherman Act to provide for civil RICO remedies, and instead recommended the enactment of separate statutes, contending that the use of antitrust laws to combat organized crime

> could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with the body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

115 Cong Rec. 6995 (1969).

This recommendation, adopted by congress, recognized that the application of antitrust commercial injury standing requirements would not be appropriate in the RICO context. *Kimmel* v. *Peterson,* 565 F. Supp. at 494.

Antitrust law has very little relevance to RICO, as each area of law serves different purposes. "Congress did not see the objectives of RICO and antitrust laws as coterminous." *Bennett* v. *Berg,* 685 F. 2d at 1059. Antitrust regulation is designed to promote market place competition and is increasingly focused on market efficiency rather than harm suffered by individual businesses. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 53 n.21 (1977); *Schacht* v. *Brown,* 711 F.2d at 1358; *Ralston* v. *Capper,* 569 F. Supp. at 1580. RICO, on the other hand,

is not concerned with either market efficiency or promoting competition, but instead is designed to inflict severe financial injury on those who commit crimes in operating an enterprise or who use an enterprise to insulate themselves from less severe penalties. *See* 115 Cong., Rec. 9567 (remarks of Sen. McClellan); Note, *supra,* at 1112-14.

As Judge Posner of the Seventh Circuit has noted, "analogies to Section 4 of the Clayton Act are forced", *Cenco Inc.* v. *Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir.), *cert. denied,* 103 S.Ct. 177 (1982). Still another court has observed:

> [RICO] is designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have [sic] no applicability here.

Ralston v. *Capper,* 569 F. Supp. at 1580 (citation omitted).

Standing in antitrust cases has been strictly limited in order to confine treble damages to extreme situations and to avoid ruining violators and reducing market place competition. However, because RICO's essential aim is to strip violators of "the fruits of [their] ill-gotten gains", *United States* v. *Turkette,* 452 U.S. at 585; *see also* 115 Cong. Rec. 602 (1970) (remarks of Sen. Hruska), such concerns are not present under RICO.

In short, a limitation of RICO standing to those who suffer a "racketeering enterprise injury", whether based on similar language in antitrust laws, analogous antitrust concepts, or merely a judicial desire to restrict the statute's scope, not only would run counter to the intent expressed by congress when it enacted RICO, but also would "lead to the anamolous result of denying standing to direct victims of racketeering activity." *Seville Industrial Machinery Corp.* v. *Southmost Machinery Corp.,* 567 F.

Supp. at 1157. As Judge Duffy of the Southern District of New York has pointed out:

> A brokerage enterprise infiltrated by organized crime and engaged in defrauding its customers * * * might injure no one but the customers of the enterprise. There would be no injury above and beyond that caused by the predicate acts of fraud forming the 'pattern of racketeering activity.' Such conduct, however, would violate RICO and would lie near the center of Congress' concern. In addition, § 1964(c) simply provides that 'any person * * * injured by reason of a violation of § 1962' may invoke RICO's civil remedies. I can imagine no construction of those words which would exclude from their coverage the primary victims of such a scheme and which would render such defendants immune from civil sanctions.

Mauriber v. *Shearson/American Express, Inc.*, 567 F. Supp. at 1240.

While it may appear that congress, by enacting RICO, has "created a runaway treble damage bonanza for the already excessively litigious", *Schacht* v. *Brown*, 711 F.2d at 1361, congress has also spoken in clear and unambiguous terms. Although RICO is a complex statute, we find it to have been carefully drafted, and congress knowingly adopted provisions of potentially far-reaching application. Efforts by various courts across the country to restrict the statute's application seem to be based more on "judicial discomfort with the broad sweep of RICO", *Kimmel* v. *Peterson*, 565 F. Supp. at 493 n.21, than on a close reading of the statute's language or an accurate study of its legislative history. We think that any restriction of RICO along the lines urged by defendants must come from congress, not the judiciary. It is not our proper role to superimpose additional requirements for

establishing a RICO claim on what is a clearly delineated statutory cause of action. As the Seventh Circuit concluded in *Schacht:*

> The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime. *United States* v. *Turkette,* 452 U.S. at 586-87, 101 S.Ct. at 2530-31 (1981).

711 F.2d at 1361.

We therefore conclude that the district court erred when it dismissed plaintiffs' complaint for failing to allege a "separate, distinct racketeering enterprise injury".

As an alternative ground for dismissal, defendants below moved to compel arbitration of plaintiffs' claims, based on an arbitration clause in the partnership agreement. Although the district court did not rule on that part of defendants' motion, plaintiffs now urge us to hold that their civil RICO claims are not subject to arbitration. Since we are compelled to uphold the dismissal of plaintiffs' complaint, we do not have to reach this issue.

Conclusion

The judgment of the district court is affirmed on the authority of *Sedima, S.P.R.L.* v. *Imrex Co.* and *Bankers Trust* v. *Rhoades.*

APPENDIX B

Opinion and Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT NEW YORK

Jan. 6, 1984

AARON J. FURMAN, MARTIN J. JOEL, JR., ALVIN KATZ, FRANCIS P. MAGLIO, HARVEY SHEID, EVERARD M.C. STAMM and ROBERT C. STAMM,

Plaintiffs,

v.

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK and A.J. YORKE,

Defendants.

No. 82 Civ. 4428 (IBC)

OPINION

IRVING BEN COOPER, District Judge.

Defendants-movants seek an order pursuant to Fed.R. Civ.P. 12(b)(1) and (6) dismissing the complaint; or in the alternative, compelling arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* For reasons set forth below, the motion to dismiss is granted on the ground hereinafter indicated.

The gravamen of the factual allegations contained in the complaint arise from the sale of Bruns, Nordeman, Rea & Co. ("Bruns") to Bache, Halsey, Stuart, Shields, Inc. ("Bache"). Plaintiffs,[1] the disgruntled, former Bruns'

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[1] Plaintiffs include: Aaron J. Furman, Alvin Katz, Francis P. Maglio, Everard Stamm, Robert C. Stamm and Harvey Sheid and Martin Joel. Complaint, dated July 7, 1982, (hereinafter "Complaint") par. 4.

general partners, maintain that defendants, the former managing directors and executive committee for Bruns,[2] sold out to Bache on terms which were more favorable to defendants than plaintiffs.

Bruns, a limited partnership formed under the laws of the State of New York, carried on a general brokerage and commission business which included the buying and selling of stocks, bonds and other securities.[3] The infrastructure of Bruns was such that the managing directors were charged with the responsibility of selecting members of the executive committee; removing members of the executive committee, for or without cause; conferring voting rights relating to partnership business on such members of the executive committee as they saw fit; and most importantly, selling all or substantially all the assets of Bruns on such terms and conditions as they, in their exclusive discretion, approved.[4] The executive committee formulated Bruns' management policies and ran Bruns' business from day-to-day.[5]

Plaintiffs aver that in or about May or June 1981, defendant Rea commnced negotiations with Bache, a large brokerage firm, for the purchase of substantially all of Bruns' assets.[6] Shortly thereafter, Rea disclosed to several other members of the executive committee his intention to sell to Bache; and formed a negotiating committee comprised of defendants Miller, Toczek and himself to work

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[2] Defendants Harold S. Coleman and Francis G. Rea were the managing directors for Bruns. Defendants John Cirrito, John A. Miller, Peter M. Toczek and A.J. Yorke, formed Bruns' executive committee. *Id.* at par. 6.

[3] *Id.* at par. 5.

[4] *Id.* at par. 6.

[5] *Id.* at par. 7.

[6] *Id.* at pars. 8-9.

out the details of the contemplated transfer.[7] By June 30, 1981 Bache and Bruns' negotiating committee had reached an agreement as to the basic terms of the transfer. Significantly, one of the essential terms of the purchase was that all partners at Bruns, including the limited partners, sign the purchase agreement—a fact, plaintiffs allege, they were never apprised of until it was too late.[8] Plaintiffs maintain that had they known their failure to sign the purchase agreement would have effectively blocked the deal, they never would have signed it.

On July 2, 1981, Bache and Bruns entered into a letter of intent describing the basic terms of the purchase.[9] Four days later, on July 6, 1981, the managing partners called a meeting of the entire partnership to apprise the remaining partners of the purchase.[10] Plaintiffs maintain that the clear tenor of the presentation was as *a fait accompli.* Indeed, several of defendants unequivocally stated that, "the deal was final and unchangeable." [11] Additionally, plaintiffs maintain that defendant Rea spoke to several of plaintiffs at or immediately after the partnership meeting to describe their respective terms of employment at Bache. Here, too, plaintiffs aver that it was made clear that the terms of employment—the unfairness of which was unknown to plaintiffs at that time—could not be altered.[12]

The very next day, a congratulatory cocktail party was

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[7] *Id.* at par. 11.

[8] *Id.* at pars. 12, 27.

[9] *Id.* at par. 16.

[10] *Id.* at pars. 20-22.

[11] *Id.* at par. 21.

[12] *Id.* at par. 22. Immediately after the July 6th meeting, the managing directors caused telegrams to be sent to all Bruns' limited partners advising them of the sale. *Id.*

held at the Waldorf Astoria Hotel for the partners and principals of both companies—a ploy, plaintiffs maintain in hindsight, to further convey the fraudulent notion of finality.[13] Additionally, news articles were published in the *Wall Street Journal* and the *New York Times* announcing the agreement between Bache and Bruns.[14]

It was not until July 23, 1981 that another partnership meeting was called to further discuss the then impending transfer.[15] It was at this meeting that plaintiffs allege they learned for the first time that their signatures were required on the contract as well as the first time they actually saw a copy of the purchase agreement.[16] Plaintiffs maintain that the notification to them, on July 23rd, that all their signatures were required effectively operated as no notice at all. By that time, Bruns' key personnel had heard the news and had already made alternative employment arrangements. Simply put, Bruns could not go on without them.[17]

In addition to a discussion of the signature requirements, plaintiffs steadfastly denied the soundness of the accepted purchase price: $3,500,000 over the book value plus additional sums depending upon future performance.[18] Apparently, on July 13, 1981, another brokerage house, Gruntal & Co., had offered Bruns a higher price.[19] Finally, plaintiffs took great exception to the employment and con-

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[13] *Id.* at par. 22(b).

[14] *Id.*

[15] *Id.* at pars. 25 and 27.

[16] *Id.*

[17] *Id.* at par. 28.

[18] *Id.*

[19] *Id.* at par. 24. The exact offer by Gruntal & Co. is not revealed in the Complaint.

sultation agreements certain defendants had made with Bache.[20]

Notwithstanding all of the foregoing and based on the representations made by the executive committee, plaintiffs signed the purchase agreement on July 27, 1981.[21] Once the purchase agreement was signed, plaintiffs allege that defendants Rea and Coleman made certain illicit payments to several defendants for the purposes of inducing their consent to the transfer to Bache as well as their earlier agreement not to disclose the critical need for plaintiffs' signatures.[22]

* * * * *

Plaintiffs commenced this otherwise garden variety business fraud action in federal court on the basis of an alleged violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Plaintiffs have also pleaded, as pendent state law claims, fraud and breach of fiduciary duty. The threshold question then, as raised by defendants' motion to dismiss, is whether or not plaintiffs have sufficiently pleaded a claim for relief

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[20] *Id.* at pars. 17 and 25. Defendant Rea was to be paid $75,000 a year for twelve (12) years and upon his death payments were to be made to his spouse. Defendant Toczek was to receive a one-time payment of $100,000 for consultation on the deal. Defendant Miller was to receive $125,000 per year, a guarantee of a Senior Vice-President position at Bache and a "promise" by Bache to use its best efforts to elect him to the board of directors. *Id.* The Complaint is contradictory on the issue of whether or not these employment and consultation agreements were annexed to the purchase agreement. *Compare* par. 18 *with* pars. 17 and 25.

[21] *Id.* at par. 29.

[22] *Id.* at pars. 13 and 14. Allegedly, defendant Miller received $50,000; defendant York received $43,000; defendant Cirrito received $20,000; and defendant Toczek received $193,500.

under the RICO statute. We are constrained to answer in the negative.[23]

We begin our analysis with the applicable RICO provision, 18 U.S.C. § 1964(b), which reads:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

The relevant portion of § 1962, 18 U.S.C. §1962(c) reads:

> "It shall be unlawful for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity. . . ."

"Racketeering activity" is also defined by the RICO statute:

> " 'Racketeering activity' means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . ." 18 U.S.C. § 1961(1)(B).

A "pattern of racketeering activity" requires "at least two acts of racketeering activity. . . ." 18 U.S.C. § 1961(5).

Defendants argue, *inter alia*, that plaintiffs have failed to plead that Bruns was an "enterprise" within the meaning of § 1962(c), *supra;* that a sale of a business constitutes

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[23] Because dismissal is so appropriate here, we do not consider that branch of defendants' motion which seeks to compel arbitration.

"affairs" within the meaning of § 1962(c); and that there was a "pattern of racketeering activity" within the meaning of § 1962(c). These arguments are nothing more than semantical strawmen—leaving nothing of substance upon which to predicate a dismissal. Surely, Bruns, until it was sold, was an "enterprise" which is defined as "any individual, partnership [or] corporation." 18 U.S.C. § 1961(4). The sale of a business (and all the transactions inherent therein) is "affairs of that enterprise"; and clearly, a "pattern of racketeering activity" is alleged as 2 or more acts of wire and mail fraud have been alleged.

Mail fraud is committed under 18 U.S.C. § 1341 when there exists: (a) a scheme to defraud; and (b) use of the mails. *See e.g., Stern* v. *U.S.*, 223 F. 763 (2d Cir. 1915). Plaintiffs have alleged that defendants mailed several letters to plaintiffs in furtherance of their scheme to defraud and this is sufficient under the statute. Wire fraud is committed under 18 U.S.C. § 1343 where a telephone conversation takes place in furtherance of a scheme to defraud. Facts relating to the various telephone conversations in furtherance of the scheme to defraud have been alleged and are sufficient under the wire fraud statute. *Id.*

As to defendant's argument that plaintiffs must plead a "tie to organized crime," the Second Circuit has answered in the negative. *Moss* v. *Morgan Stanley, Inc. et al.*, 719 F.2d 5 at p. 21 (2d Cir. 1983). Indeed, the panel of our Circuit Court noted:[24]

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[24] Before the definitive statement by the Second Circuit in *Moss*, Judges in th' circuit were split on this pleading requirement. *Compare Mauriber* v. *Shearson/American Express*, Fed.Sec.L.Rep. ¶ 98,857 at pp. 94,421-2 (S.D.N.Y. 1982) and *Meineke Discount Muffler Shops, Inc.* v. *Noto*, 548 F.Supp. 352, 354 (E.D.N.Y. 1982) with *Moss* v. *Morgan Stanley, Inc.*, 553 F.Supp. 1347 at p. 1359 (S.D.N.Y. 1983) and *Minpeco S.A.* v. *Conti-commodity Services, Inc.*, 558 F.Supp. 1348 at pp. 1350-1351 (S.D.N.Y. 1983) It is also unclear that *Moss* will remain as the definitive statement on this RICO pleading requirement. *The Trane Company* v. *O'Connor Securities et al.*, 718 F.2d 26 at p. 28 fn. 3 (2d Cir. 1983).

> The *district court stated that 'application of RICO should be restricted sharply to organized crime and the enterprises on which its talons have fastened. Thus, courts in the Southern District and elsewhere have held that RICO claims for damages could be maintained only if there was a tie to organized crime'* 553 F.Supp. at 1361 (citing *Noonan* v. *Granville-Smith,* 537 F.Supp. 23, 29 (S.D.N.Y. 1981); *Barr* v. *WUI/TAS, Inc.,* 66 F.R.D. 109, 112-13 (S.D.N.Y.1975); and *Waterman Steamship Corp.* v. *Avondale Shipyards, Inc.,* 527 F.Supp. 256, 260 (E.D.La.1981); *accord Wagner* v. *Bear, Stearns & Co.,* [current] Fed.Sec.L.Rep. (CCH) par. 99,032 (N.D.Ill.1982); *City of Atlanta* v. *Ashland-Warren, Inc.,* 1982-1 Trade Cas. (CCH) par. 64,527 (N.D.Ga. 1982).
>
> It is true that RICO's legislative history states that it was enacted to provide 'enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922, *reprinted* in 1970 U.S.Code Cong. & Ad.News 1973; *see United States* v. *Ivic,* 700 F.2d 51, 62 (2d Cir.1983). *The language of the statute, however, does not premise a RICO violation on proof or allegations of any connection with organized crime.* (footnotes omitted) (emphasis added)

However, defendants' final argument that plaintiffs' failure to plead a distinct RICO injury positively compels dismissal. The fundamental statutory predicate which permits a civil RICO action reads:

> "Any person injured *in his business or property by reason of* a violation of section 1962 of this chapter may sue therefor. . . ." 18 U.S.C. § 1964(b) (emphasis added).

The pertinent portion of 18 U.S.C. § 1962 defines the prohibited act as "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." A pattern of racketeering activity includes 2 or more acts of mail and/or wire fraud. District Courts in the Southern District have, without exception, concluded after reviewing the foregoing statutory language that a RICO plaintiff must allege more than injury from the predicate acts of mail and/or wire fraud—something not done here.

Judge Pollack reasoned this way:

> "The use of the mails or the sale of securities are named as two of the methods by which the enumerated Section 1961 activities prohibited in Section 1962 may fall under the ban. The cardinal question at the threshold is whether there has been a commission of one of the enumerated prohibited activities—one of the racketeering crimes in the course of organized crime defined by the RICO statute—which has caused injury to the plaintiff. RICO was thus established as a civil weapon against those engaged in organized crime who have gained an unfair *competitive* or *financial* advantage through criminal means associated with racketeering. The statutory offenses created by RICO were aimed at the evils of criminal racketering by organized crime that had spread through the economy. *U.S.* v. *Turkette,* 452 U.S. 576, 589 [101 S.Ct. 2524, 2531, 69 L.Ed.2d 246] (1981). The sweep of the statute does not embrace ordinary violators charged in common law fraud actions or federal securities law violations as the predicate offenses for RICO relief, albeit the use thereof to accomplish one of the enumerated felonies in the statute may be an element of and lead to RICO liability if organized criminals engage in the prohibited activity. The supporting civil remedies of

the statute were designed against organized criminals and terrorists as an additional weapon in the crime fighters' arsenal. In other words, plaintiffs' injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of a predicate offense, such as mail fraud or federal securities fraud. RICO's civil remedy provision permits a recovery to 'any person injured in his business or property by reason of a violation of Section 1962,' 18 U.S.C. Section 1964(c), that is, where the distinctive RICO violation contributed to plaintiffs' injury, i.e., where the plaintiff suffered directly a racketeering enterprise injury at the hands of those sought to be reached by the Organized Crime Control Act of 1970. . . . The purpose was to provide 'enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' Congressional Statement of Findings and Purposes, Pub.L. No. 91-452, § 1.84 Stat. 922, 923. It has appropriately been said: *'The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their business in interstate commerce into treble damage RICO actions. Waterman SS Corp.* v. *Avondale Shipyards, Inc.*, 527 F.Supp. 256, 260 (E.D. La.1981). . . .' Moreover, there is nothing in the legislative history to suggest that Congress intended to create a private right of action for treble damages for violations of substantive statutes by ordinary business or parties. For example, it was clearly established at the time that RICO was enacted that there was no private right of action for violations of the mail fraud statute. It is implausible that Congress could have meant to alter this accepted rule to the extent of creating a right of action for treble damages without

> a single mention of such a revolutionary consequence any where in the legislative history."

Moss, supra at pp. 21-22 (emphasis added). *See also Richardson* v. *Shearson/American Express,* 573 F.Supp. 133 at 137 (S.D.N.Y.1983).

Judge Sweet put it this way:

> "[Plaintiff], however, has failed to state a cause of action under RICO since she has failed to assert an injury resulting from the racketeering enterprise violation. The only injury alleged is from the predicate acts which are asserted to have established the pattern of racketeering activity. In *Landmark Sav. & Loan* v. *Rhoades,* 527 F.Supp. 206, 208-209 (E.D.Mich.1981), the Honorable James P. Churchill determined that a civil RICO damage action requires an allegation of a 'racketeering enterprise injury,' some injury resulting from the violation of Section 1962 rather than merely the predicate acts. Judge Churchill drew an analogy to the similarly drafted treble damage provision of Section 4 of the Clayton Act, 15 U.S.C. § 15 N1. In construing the Clayton Act, the Supreme Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 [97 S.Ct. 690, 697, 50 L.Ed.2d 701] (1977), determined that to recover treble damages for an antitrust violation the plaintiff 'must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury . . . The injury should reflect the anti-competitive acts made possible by the violation. . .' [A] similar analysis is required under RICO. Requiring the assertion of a 'racketeering enterprise injury' is also consistent with the distinctions that have been drawn between the violation of RICO and the criminal violations which constitute the predicate acts which serve to establish the

> pattern of racketeering activity. . . . *Since a party can be convicted and punished separately and consecutively for the predicate acts and the RICO violation, civil remedies should similarly be available separately and cumulatively since the remedies reflect recovery for different wrongs.*" *Alton* v. *Alton*, No. 82 Civ. 0795 (RWS) slip. op. at pp. 5-6 (S.D.N.Y.1982) (Emphasis added).

Having reviewed the requirement of pleading a "racketeering enterprise injury," we turn to the allgations contained in the complaint regarding damages. Plaintiffs allege damages as follows:

> Plaintiffs were damaged by defendants' pattern of racketeering activity in amounts to be determined at discovery and trial. Damages include, but are not limited to, the following:
>
> (a) On information and belief, had plaintiffs been aware from the outset of the negotiations with Bache that their consent was necessary to the consummation of the Purchase Agreement, they would have been enabled to bargain for and receive from defendants Rea and Coleman sums comparable or larger than the payments bestowed upon defendants as alleged hereinabove in paragraph 13.
>
> (b) Each plaintiff was forced to accept employment on terms and conditions that could have been improved had the defendants negotiated impartially on behalf of all Bruns' partners or had plaintiffs been aware of the opportunity to negotiate on their own behalfs.
>
> (c) On information and belief, because of the insistence by certain members of the Executive Committee on favorable and lucrative employment arrangements for themselves with Bache, Bache was induced

> to lower the price it was willing to pay for Bruns' assets, thereby reducing the consideration flowing to the partnership as a whole (of which plaintiffs were to receive their percentage shares), and increasing the consideration to defendants personally (in which plaintiffs would not share at all).
>
> (d) On information and belief, as a result of the payoffs described above, the Executive Committee failed to discharge its duty of finding the potential purchaser willing to make the largest offer for Bruns' assets.

Complaint, par. 32.

What is significant about these damage allegations is that they are identical to the damage allegations for the common law fraud claim—and not in any way distinct, racketeering enterprise injuries. Indeed, the damage allegation for the fraud claim for relief reads: "As a result of the wrongful acts of defendants, plaintiffs have been damaged to the extent alleged in paragraph 32 above [—the paragraph alleging the RICO damages.]" *Id.* at par. 42.

Clearly then, because of the identical nature of the fraud and RICO damage allegation, the complaint should be dismissed on the ground that plaintiffs have failed to allege a separate, distinct racketeering enterprise injury.

Accordingly, we are constrained to, and hereby do, dismiss the complaint on the ground hereinabove indicated.

So Ordered.

APPENDIX C

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of July, one thousand nine hundred and eighty-four.

Present:

HON. RICHARD J. CARDAMONE
HON. GEORGE C. PRATT
HON. DANIEL M. FRIEDMAN*
Circuit Judges.

AARON J. FURMAN, ALVIN KATZ, FRANCIS P. MAGLIO, MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM and ROBERT C. STAMM,

Plaintiffs,

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM and ROBERT C. STAMM,

Plaintiffs-Appellants,

v.

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK and A.J. YORKE,

Defendants-Appellees.

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* Honorable Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

Appendix C—Judgment of Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith
Clerk

by: Arthur Heller
Arthur Heller
Deputy Clerk

APPENDIX D

Statutory Provisions Involved

Chapter 96—Racketeering Influenced and Corrupt Organizations

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering parapehrnalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (re-

lating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connecteed with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred

in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, and Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provision of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a

pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so ,shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Appendix D—Statutory Provisions Involved

§ 1963. Criminal penalties

* * *

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provisions for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

No. 84-604

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN J. JOEL, JR., HARVEY SHEID,
EVERARD M.C. STAMM, ROBERT C. STAMM,

Petitioners,

—v.—

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER,
FRANCIS G. REA, PETER M. TOCZEK, A.J. YORKE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court entertain the questions posed by the petition, at a point when Congress itself is about to address those questions and others relating to civil RICO?

2. May a routine, state-law partnership dispute, subject to arbitration, be transformed into a federal action for treble damages and attorneys' fees, merely by pleading the statutory words of civil RICO?

3. Should not this Court deny certiorari so as to terminate the litigation and thereby advance the "core purpose," *Southland Corp.* v. *Keating*, 104 S. Ct. 852, 857 (1984), of the parties' agreement to arbitrate?

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COUNTERSTATEMENT OF THE CASE

The district court correctly described this case as a "garden variety business fraud action" (Pet. App. 24a). The parties are all partners of a former brokerage firm; their dispute involves a disagreement over the sale of the firm; and the dispute falls squarely within the ambit of an arbitration provision in the Partnership Agreement signed by all the parties. On any proper interpretation of civil RICO, we submit, this dispute does not belong in a federal court.

The Parties

The original parties to this action were all the general partners of the respected former brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns"). Defendants-respondents Coleman and Rea were the Managing Directors of Bruns. Together with the other four defendants-respondents, they comprised the firm's Executive Committee, which had broad responsibility for the operation of Bruns. (JA[1] 8-9, ¶¶ 6-7)

The six defendants were the most senior and accomplished partners and collectively accounted for the lion's share of the general partners' equity in the firm. (JA 66) The petitioners, none of whom were members of the Executive Committee, were among the remaining general partners of the firm. (JA 7, ¶ 4)

The Partnership Agreement

A comprehensive Partnership Agreement, signed by all the parties, governed the rights and obligations of the Bruns partners. (JA 8, ¶ 6; JA 44-103)

The Partnership Agreement provided that the Managing Directors (defendants Coleman and Rea) "by unanimous vote, shall have full power and authority on behalf of all of the partners, at any time, to sell or otherwise transfer all or substantially all of the assets and business of the partnership, on such terms and conditions as the Managing Directors, in their sole discretion, may approve. . . ." (JA 67)

The Partnership Agreement also provided that the Executive Committee (the six defendants) "shall have the right to make all determinations with respect to the business policies to be pursued by the Partnership in carrying on its business, the management of the affairs of the Partnership, and on all matters of every nature and description." (JA 51)

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1 Citations to portions of the record that are not included in the petitioners' appendix are to the Joint Appendix submitted by the parties to the Court of Appeals for the Second Circuit.

Finally, the Partnership Agreement contained a broad arbitration clause, requiring arbitration before a panel of the New York Stock Exchange of substantially all disputes, including the one at bar, relating to the partnership. The arbitration clause reads:

> In the event of any disagreement or controversy arising between any of the partners, or their legal representatives, either during the continuation of the Partnership or after its termination, with respect to the distribution of its assets or any interpretation of the terms of this Agreement, or anything in relation to the subject of the Partnership, other than any questions or matters relating to management of the business, affairs or policies of the Partnership as specified in Article 9 above, such disagreement or controversy shall be determined by arbitration pursuant to the laws of the State of New York. Such arbitration shall be conducted pursuant to the rules of the New York Stock Exchange, Inc. by the Board of Arbitration of said Exchange or pursuant to such other rules and by such other arbitral body as may be consented to by all of the parties to such disagreement or controversy. (JA 92)[2]

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2 It is clear that the dispute in this case does not come within the exception relating to "matters . . . as specified in Article 9." Article 9 of the Partnership Agreement (JA 50-51) reads, in full:

> The Executive Committee of the Partnership shall consist of the Managing Directors and such other General Partner or General Partners as the Managing Directors may in their discretion from time to time elect to said Committee (hereinafter referred to as the "additional members"). The Managing Directors shall determine the manner of election of additional members and shall have the right at any time to remove any additional member with or without cause; provided, however, that no additional member shall be elected or removed without the affirmative vote of a majority of the Managing Directors then in office. Each Managing Director shall have one (1) vote. Each additional member of the Executive Committee shall have one (1) vote or such fraction of one (1) vote as the Managing Directors in their sole discretion shall determine; provided, however, that all of the additional members in the aggregate shall not have more than three (3) votes.

The Sale to Bache

On July 23, 1981, the general partners, including all of the original plaintiffs to this action, signed a Purchase Agreement transferring substantially all of the assets of Bruns to the firm then known as Bache Halsey Stewart Shields Inc. ("Bache"). (JA 12-13, ¶ 16; JA 147-148) Negotiations between Bruns and Bache were conducted by members of the Executive Committee, who, under the terms of the Partnership Agreement, were fully authorized to do so. (JA 10-11, ¶¶ 11-12; JA 51, 67)

Under the Purchase Agreement, Bache made a lump sum payment to the Bruns partners of $3.5 million over the book value of Bruns' assets and agreed to make additional contingent payments based on future performance. The $3.5 million payment was apportioned among the Bruns partners—including plaintiffs—according to their partnership shares. (JA 13, ¶ 17)

In connection with the sale of Bruns to Bache, all the Bruns partners, including all of the plaintiffs and all of the defendants, were represented by the same distinguished counsel, Shearman & Sterling. (JA 145)

The Complaint

A year after the sale to Bache, petitioners, instead of invoking the arbitration clause in the Partnership Agreement, filed suit in the United States District Court for the Southern District of New York. Their complaint asserts three claims against defendants, each arising out of the sale of Bruns to Bache: common-law fraud, breach of fiduciary duty, and a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (hereinafter "RICO"). There is an exact identity between the injury alleged under the RICO claim and that alleged under the two state law claims. (JA 22-24, ¶ 32; JA 27, ¶ 42) Federal jurisdiction is predicated solely on the civil RICO claim.

The complaint alleges that, in connection with the sale of Bruns to Bache, defendants for several weeks withheld material information from plaintiffs (principally that plaintiffs would be required to sign the Purchase Agreement and that the terms of their future employment with Bache continued to be open to negotiation), that "pay-offs" were made to some defendants to secure the agreement of all defendants to the sale, and that the defendants engaged in self dealing to derive personal benefit from the sale. (JA 19-21, ¶¶ 26-30; JA 11-12, ¶ 13; JA 29-30, ¶¶ 47-48)

In order to bring the action under civil RICO, plaintiffs allege that Bruns was an "enterprise," that defendants' use of the mails and telephone in the course of the sale of Bruns to Bache constituted multiple acts of mail and wire fraud, and that these alleged multiple violations constituted a "pattern of racketeering activity." (JA 8, ¶ 5; JA 21-22, ¶ 31)

There is no allegation that the defendants engaged in any wrongdoing except in connection with the sale to Bache, that the defendants used improperly obtained funds to effectuate the sale, that the defendants used the proceeds of the sale for improper purposes, that the defendants are in any way connected with organized or any other kind of crime, or that defendants have been investigated, indicted, or convicted for any crime. To be sure, plaintiffs allege "breach of fiduciary duty" and "fraud," and they dub adjustments of partnership distributions as "pay-offs." But those or similar adjectives perhaps inevitably would accompany the dissolution of any law, accounting, or business partnership in which (and, almost by definition, because) amicable relations among the partners ceased to exist.

Thus, were it not for the assertion of a civil RICO claim, this would be the most ordinary kind of state-law dispute among partners unhappy over the division of the partnership pie; and the dispute would have been long ago submitted to arbitration pursuant to the Partnership Agreement.

Proceedings Below

Defendants timely moved in the district court to dismiss the complaint for failure to state a claim for relief under civil RICO; in the alternative, to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. (Pet. App. 20a)

The district court dismissed the complaint for failure to state a federal claim; it did not reach the alternative motion to compel arbitration. The court focused on the language of 18 U.S.C. § 1964(c), which states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor. . . .

The district court held that the RICO allegations of the complaint fail because the complaint alleges no injury "by reason of" a RICO violation—beyond the injury allegedly caused by the state-law wrongs. The court wrote:

> What is significant about these damage allegations [in the RICO portion of the complaint] is that they are identical to the damage allegations for the common law fraud claims—and not in any way distinct, racketeering enterprise injuries. . . . [T]he complaint should be dismissed on the ground that plaintiffs have failed to allege a separate, distinct racketeering enterprise injury. (Pet. App. 32a)

On the appeal, which was not joined in by several of the original plaintiffs, a panel of the Court of Appeals for the Second Circuit disagreed that a civil RICO plaintiff must allege a "distinct racketeering enterprise injury," but it affirmed the dismissal of the complaint on the authority of decisions by two other panels of the Second Circuit that had held such an allegation is required. (Pet. App. 1a-19a) *Sedima, S.P.R.L.* v. *Imrex Co. Inc.*, 741 F.2d 482 (2d Cir. 1984); *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984).

Taken together, the decisions in *Sedima*, *Bankers Trust*, and in this case "amount to an en banc ruling by the Second Circuit,"[3] that a civil RICO plaintiff must allege something more by way of "distinct racketeering enterprise injury" beyond that caused by the predicate acts of "racketeering" defined in 18 U.S.C. § 1961.

On October 19, 1984, the Court of Appeals for the Seventh Circuit decided *Haroco, Inc.* v. *American National Bank and Trust Company of Chicago*, No. 83-2529, which, unlike the decisions cited by petitioners (Pet. 11)[4], does create a direct conflict with the Second Circuit.

Notwithstanding the conflict, we respectfully urge the Court to deny the petition for certiorari, for the following reasons:

REASONS FOR DENYING THE WRIT

I

CONGRESS ITSELF IS ABOUT TO ADDRESS THE QUESTIONS POSED BY THE PETITION.

Consideration by this Court of any issue relating to civil RICO—whether raised in the instant petition or in the others filed this Term—may soon be rendered unnecessary because comprehensive congressional review of the statute appears imminent. Congress is now fully seized of what petitioners call the "turmoil" (Pet. 12) of civil RICO.

On October 5, 1984, Senator Thurmond, Chairman of the Senate Committee on the Judiciary, announced that hearings on civil RICO will be held promptly upon the convening of the new Congress. He said:

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3 *Haroco, Inc.* v. *American National Bank and Trust Company of Chicago*, No. 83-2529 (7th Cir. Oct. 19, 1984), slip op. at 8.

4 The Eighth Circuit, for example, stated that its decision in *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413 (8th Cir. 1984), is "consistent" with *Bankers Trust*.

> [T]he civil RICO part of title IX [of the Organized Crime Control Act of 1970] was crafted to enhance the protection of legitimate businesses against the syndicate's infiltration by dealing with organized crime as an economic phenomenon.
>
> Unfortunately, the scope and intent of the RICO provisions have been the subject of widespread uncertainty and discussion in the courts since their enactment.
>
> * * * * *
>
> Mr. President, when we acted on this RICO statute as part of the Organized Crime Control Act of 1970, I think it is fair to observe that we might not have envisioned the full use of the statute by private civil litigants to include a civil RICO count in their ordinary business litigation alleging misstatements and fraud. In an effort to reach all kinds of racketeering activity, the Congress wrote the statute in broad, sweeping terms. To allege a RICO charge is relatively simple in today's complex, interstate commercial environment. The added appeal of a Federal forum, of a treble damage money recovery, and attorney's fees increases incentives to allege a RICO statute violation in the context of an ordinary commercial law or contract cause of action ordinarily brought in State courts.
>
> * * * * *
>
> It is, therefore, imperative that the Congress hold hearings as soon as possible on this issue to determine if the intention of the Congress in enacting RICO is being carried out, and, if not, what legislative changes are necessary to bring that about. It is my intention to hold such hearings as soon as possible next year after the Congress convenes.

130 Cong. Rec. S 13349-50 (1984).

In the past, one commentator has noted, this Court has declined to review even important questions of state in the expectation of congressional or executive action. *See* Note,

Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making, 16 Va. J. Int'l L. 903, 922-23 (1976). Equally, the Court has declined to grant certiorari to resolve clear conflicts among the circuits, seemingly because prompt congressional attention to the conflict was likely. *See* Brief for the United States in Opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States*, 53 U.S.L.W. 3236 (1984); Brief for the National Labor Relations Board in Opposition in *Spencer* v. *National Labor Relations Board*, 104 S. Ct. 1908 (1984).

In this case, at this particular juncture, petitioners' own arguments on the merits—and the reasoning of those courts and commentators that agree with petitioners' proposed reading of civil RICO—counsel that the Court exercise its discretion so as to deny certiorari.

Virtually all courts and commentators agree that civil RICO *should not* apply to routine commercial disputes of the kind involved in this case. Even the panel below agreed with the Seventh Circuit that its reading of civil RICO would mean that Congress had "created a runaway treble damage bonanza for the already excessively litigious," (Pet. App. 18a, quoting *Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983)). But petitioners and others contend that, as now written, civil RICO does so apply, and that appeals to limit the reach of the statute should be made to Congress.

Petitioners argue that for the courts to require a distinct "racketeering enterprise injury" is an inappropriate "intrusion into the legislative process," (Pet. i). The panel below said that restrictions on civil RICO "must come from congress, not the judiciary," (Pet. App. 18a). The Seventh Circuit, in declining to find a racketeering injury requirement, was concerned about engaging in "aggressive jurisprudence," even though the court agreed that Congress had not anticipated application of civil RICO to the kind of banking issue before it. *Haroco*, *supra*, slip op. at 29, 30. Considerations of judicial restraint and deference to Congress are the reasons invariably given for

interpretations of civil RICO that are widely acknowledged to be, at the very least, anomalous. *See, e.g.*, Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982).

We disagree, on the merits, that judicial restraint and deference to the legislature support petitioners' interpretation of civil RICO. But, at a time when Congress has stated it is about to act on civil RICO, such considerations argue against granting certiorari in any civil RICO case during this Term.

II

THE COMPLAINT WAS PROPERLY DISMISSED.

The comprehensive majority opinions in *Sedima* and *Bankers Trust* set out the reasons—based on the statutory words, the legislative history, and sound policy—why section 1964(c) requires a civil RICO plaintiff to allege by way of racketeering injury *something* more than injury derived simply from the alleged underlying predicate acts. We need not repeat those reasons here.

Those reasons do, however, have a special force on the facts of this case. For this case undeniably is a routine common law dispute. On petitioners' interpretation of section 1964(c) of RICO, "every bad faith breach of contract or common law fraud where a plaintiff alleges that defendants used the mails would be transformed into a RICO suit." *North Barrington Development, Inc.* v. *Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). What is more, petitioners urge that civil RICO even overrides the parties' broad arbitration agreement. On petitioners' theory, an everyday UCC contract by any "enterprise" for the sale of goods, even one containing an arbitration clause, could be turned into a federal RICO claim for treble damages and attorneys' fees, merely by alleging two interstate phone calls and defendant's bad faith failure to deliver.

If petitioners' complaint had been permitted to stand, and if they had been held entitled in a federal court to seek treble damages and attorneys' fees, then they would have worked a wholesale federalization of common law, would have frustrated the decades-old federal policy favoring arbitration, would have enlarged most local statutes of limitations to RICO's ten-year period, and would have created an extraordinary incentive for a further explosion of litigation, when alternatives to litigation are continually encouraged by the Chief Justice and many others. In an age when this Court has struggled to limit the intrusion of state-law civil claims upon the federal system, *see, e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 478 (1977), petitioners ask the Court to accept certiorari in order to thrust the doors of the federal courts open to a degree they never have been opened before.

No court or commentator has suggested that Congress, in enacting civil RICO, affirmatively intended any such "absurd results", *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). To the contrary, despite their conflicting conclusions, the circuits agree that *civil* RICO was accompanied by a "clanging silence of . . . legislative history," *Sedima*, *supra*, 741 F.2d at 492; *Haroco*, *supra*, slip op. at 12. And they agree Congress did *not* anticipate that civil RICO would be used in garden-variety state-law disputes such as that involved here. *Sedima*, *id.*; *Haroco*, *supra*, slip op. at 29.

In these circumstances, the teaching of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), compelled dismissal of the complaint. In *Brunswick*, the Court construed the antitrust analog of section 1964(c) of RICO. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides treble damages and attorneys' fees to persons injured "by reason of" anything forbidden by the antitrust laws. This Court held that plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent," 429 U.S. at 489 (emphasis in original). In so holding, the Court was guided by this principle:

> Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of those consequences, 'we should insist upon a clear expression of a congressional purpose . . .' before attributing such an intent to Congress.

429 U.S. at 488.

We do not contend, as petitioners have argued we do, that the courts should import wholesale into civil RICO an antitrust standing requirement such as "competitive injury." We do contend that a RICO plaintiff must at a minimum plead injury "of the type" that RICO was intended to redress, both under *Brunswick* and under the most traditional principles for determining when private tort liability may be predicated upon a criminal or regulatory statute. For example, in the famous case of *Gorris* v. *Scott*, L. R. 9 Exch. 125 (Court of Exchequer 1874), *reprinted in* H. Schulman & F. James, *Cases and Materials on the Law of Torts* 337 (2d ed. 1952), defendant had violated the regulatory statute at issue, but the court did not permit a tort action based on that violation because "the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable." *Id.* at 338. *See generally Prosser and Keeton on the Law of Torts* 225 (5th ed. 1984)

As in *Brunswick* and *Gorris* v. *Scott*, petitioners' injury here is simply not "of the type" the statute was intended to redress. And it is not rendered "of the type" civil RICO was intended to redress merely because RICO applies to fraud, petitioners have alleged fraud, and "fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm." (Pet. App. 11a) The quoted statement by the panel below begs the real question. Before RICO, fraud, and certainly the Wall Street variety, was already the subject of elaborate federal and state regulation, carefully circumscribed and judicially construed. The question is, for

what kinds of civil fraud, and under what circumstances, did Congress intend to superimpose new, draconian federal remedies upon those pre-existing. If it be urged—as petitioners here must urge—that those circumstances include virtually all instances of alleged fraud involving two mailings, then the full answer was given in *Sedima, supra*, 741 F.2d at 492:

> If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternative and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it.

Where a proposed construction of a statute leads to "peculiar consequences"—as the panel below seemed to acknowledge petitioners' reading of civil RICO would—courts are required to seek "a clear expression of a congressional purpose" to provide a new federal treble damages remedy for injuries of the type alleged by petitioners. *Brunswick*, *supra*, 429 U.S. at 488. Nothing in the legislative history of *civil* RICO provides any indication, much less a "clear expression," that an ordinary (and arbitrable) common law dispute among business partners is to become the province of the federal courts.

The Seventh Circuit's decision in *Haroco*, like the panel decision below, fails correctly to conduct the analysis required by *Brunswick*. The *Haroco* court acknowledges that Congress did not foresee that *civil* RICO would be used in the ordinary commercial context before it, slip op. at 16-17, 28, 29, and that the legislative history is virtually silent on the intended scope of civil RICO, *id.* at 12, 19. The *Haroco* court concludes, however, that "to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention," *id.* at 29.

This would put the burden precisely the wrong way: under *Brunswick*, where the application of a statute in circumstances unforeseen by Congress leads to "peculiar consequences," courts must seek a clear expression of Congress's intent to *include* the circumstances yielding those peculiar consequences.

The court in *Haroco* errs in other respects. The court states that whether or not Congress intended routine commercial disputes to be within the reach of civil RICO, there is no "principled criterion" for distinguishing cases that are within civil RICO from those that are not. *Id.* at 13, 29. The court, not presented with a ready definition of "racketeering injury," felt obliged to read the literal words of the statute so as not to require such injury and thus to embrace conduct that Congress "did not anticipate." The Seventh Circuit's error here was to equate "principled" criteria with a "simple" criterion. It erred in thinking that the perceived absence of an easy definition means that there is no definition.

This Court has taken a far different approach in analogous circumstances. Justice Brandeis recognized in *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918) that the opening words of the Sherman Act ("Every contract . . . in restraint of trade . . . is declared to be illegal") could not be read literally because "[e]very agreement concerning trade, every regulation of trade, restrains." The Court was not deterred by the absence of a single, simple criterion for distinguishing reasonable from unreasonable restraints upon trade. The distinction was defined in the first instance by a series of general considerations set out by Justice Brandeis, and thereafter left to further judicial construction on a case by case basis.

Similarly, it is not necessary, as the Seventh Circuit appeared to say, that "RICO injury" or "racketeering enterprise injury" be immediately distinguishable from other injury in a phrase or a sentence. The definition may appropriately consist of a constellation of relevant factors. Legitimate definitional content may be imported into "racketeering enterprise injury"

from the legislative history and from established general federal policies (such as that favoring arbitration). The Justice Department's RICO guidelines, while formally applicable to criminal prosecutions, set out some of the kinds of considerations that may properly be included in a definition of racketeering injury for civil RICO. Department of Justice RICO Guidelines, *United States Attorneys' Manual*, Tit. 9, Ch. 110 (adopted Jan. 30, 1981), *reprinted in* ABA, Division of Professional Education, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, Vol. I, Tab D-1, Attachment B (1983).

Requiring a civil RICO plaintiff to allege separate "racketeering injury" does not "distur[b] the policy choices Congress has made," *Haroco*, *supra*, slip op. at 29-30. On the *criminal* side of RICO, Congress did deliberately make a policy choice for overinclusion, and thus the courts are "without authority" to circumscribe its broad provisions, *United States* v. *Turkette*, *supra*, 452 U.S. at 587. But on the *civil* side, no policy choice relating to statutory breadth is discernible from the sparse legislative history. *See Sedima*, *supra*, 741 F.2d at 488-89, 492; *Haroco*, *supra*, slip op. at 12, 19, 29. On the civil side, there is no evidence that "Congress deliberately ch[ose] to unleash such a broad statute on the nation," *Haroco*, *supra*, slip op. at 29.

Nor would a requirement of pleading separate "racketeering injury" constitute "aggresive jurisprudence," *Haroco*, *supra*, slip op. at 30. The traditionalist jurisprudence is to interpret statutes so as to make them fit the pattern of the law—and not to assume that Congress silently or unwittingly worked radical changes in the law, such as those necessarily entailed by petitioners' reading of civil RICO. *See Brunswick*, *supra*, 429 U.S. at 488; Traynor, *Statutes Revolving in Common-law Orbits*, 17 Cath. U.L. Rev. 401, 402 (1968) (courts must "synchronize the unguided missiles launched by legislatures with a going system of common law"); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln*

Mills Case, 71 Harv. L. Rev. 1, 8, 30-31 (1957) (where a particular reading of a statute would work a large structural change in the law, there is no legislative accountability unless the legislators explicitly effect that change). Especially is the jurisprudence not aggressive when the interpretation that would avoid major disruptive changes in the law is based on the traditional principle for determining when tort liability follows from a criminal statute. See p. 12, *supra*.

In sum, while there is room for debate about the persons or precise activities that are within the reach of civil RICO, the present complaint surely is outside the scope of the statute, and it properly was dismissed. To hold otherwise would turn civil RICO on its head, transforming a statute that arguably embraces some types of business fraud in order to ensure an effective remedy against the statute's principal target, organized crime, into an act, the principal effect of which is to federalize the common law (while simultaneously supplanting arbitration and encouraging fraud claims with the lure of treble damages and attorneys' fees), but which reaches organized crime only incidentally, if at all.

III

CONTINUATION OF COURT PROCEEDINGS WOULD DEFEAT THE "CORE PURPOSE" OF THE PARTIES' AGREEMENT TO ARBITRATE.

Although neither court below reached respondents' motion to compel arbitration, it is clear, we submit, that the dispute at bar should never have engendered litigation in any court, state or federal. The Partnership Agreement among the parties contains a broad arbitration clause requiring arbitration of this matter before a panel of the New York Stock Exchange.

Moreover, as a member of the New York Stock Exchange, Bruns and its general partners were bound by rules of the Exchange, which also require arbitration of this dispute. The

Constitution of the New York Stock Exchange, Article VIII, ¶ 1, provides:

> Any controversy between parties who are members . . . and any controversy between a non-member and a member . . . arising out of the business of such member . . . or the dissolution of a member firm . . . shall at the instance of any such party, be submitted for arbitration, in accordance with the provisions of the Constitution and the Rules of the Board of Directors.

In *Southland Corp.* v. *Keating*, 104 S. Ct. 852 (1984), this Court determined to exercise its jurisdiction and avoid frustrating the "core purpose" of a contract to arbitrate:

> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.
>
> * * * * *
>
> For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.

104 S. Ct. at 856-7.

The same rationale that led this Court to accept jurisdiction and to rule upon the arbitration issue in *Southland* argues for denying certiorari and thereby terminating this litigation. For the very continuation of court proceedings that a grant of certiorari (or even a decision to hold this case) would necessarily entail would impair the rights that respondents sought to secure by entering into an agreement to arbitrate.

Indeed, petitioners' arguments on the merits here would, as a practical matter, undo *Southland*: minor amendments to the complaint in that case (which alleged "fraud, oral misrepresentation . . . breach of fiduciary duty. . . ," 104 S. Ct. at 855) would have, on petitioners' theory, transformed that case into a federal RICO suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 13, 1984

Respectfully submitted,

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(3)

No. 84-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M. C. STAMM, ROBERT C. STAMM,

Petitioners,

v.

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A. J. YORKE,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Conflict Concededly Generated by the *Haroco* Case

Our Petition for Writ of Certiorari was filed on October 15, 1984. Four days later, on October 19, 1984, the Court of Appeals for the Seventh Circuit decided *Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago,* No. 83-2529. That decision unmistakably, unambiguously and emphatically rejected and contradicted every salient point on which were based the Second Circuit's trilogy of *Sedima S.P.R.L.* v. *Imrex Co., Inc.,* 741 F.2d 482 (2d Cir. 1984); *Bankers Trust Co.* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984), and *Furman* v. *Cirrito,* 741 F.2d 524 (2d Cir. 1984). We thus have a conflict among the Circuits which cannot be swept away by any semantic obfuscation. The respondents in our case have acknowledged this conflict (Respondents' Brief, p. 7), but have tried to dilute the significance of this

conflict by submitting a melange of "reasons" for denying the writ (Respondents' Brief, p. 7, *et seq.*).

Each "reason" is spurious. And, compounding the insufficiency of the "reasons", respondents have miscited or misused authorities, or omitted those that they should have cited. Thus:

1. Respondents urge that this Court should leave the Circuit Courts and the District Courts in a welter of confusion and chaos because, at some remote time, in some remote fashion, Congress might re-examine the RICO statute. And, after hearings in the unknown future, a Committee of the Congress might decide to recommend that the RICO statute should be modified, clarified or left unchanged. The respondents have built a thesis, based on wholesale uncertainty, that this Court should not resolve a question of first impression and of undeniable importance to literally hundreds of courts and to the public at large. It is self-evident that to have years elapse, while we await conjectural legislative action which might solve nothing, would be only to perpetuate the existing confusion among the courts which cries out for an authoritative resolution by our Highest Court.

Respondents, at page 8 of their Brief, purport to quote from the Congressional Record. However, they have deleted with asterisks the portions of 130 Cong. Rec. S13349-50 (October 5, 1984) which reveal the existence of the split in the Circuits in requiring a condition precedent for standing to sue under civil RICO. In the portion omitted by respondents, Senator Thurmond emphasized: "as a result of the varying judicial interpretations of RICO, . . . [t]hese questions and uncertainties have undermined the effectiveness of this weapon and must be resolved." In its entire context, it is aggressive advocacy for respondents to imply that the congressional action that they envisage would *per force* eviscerate civil RICO. Quite the contrary, civil RICO might even be strengthened. Or, civil RICO might remain unchanged. Indeed, immediately after Sena-

tor Thurmond's remarks, Senator DeConcini, at 130 Cong. Rec. S13350, contributed his own observations of the range of possible congressional action, saying:

> These hearings will provide the forum to determine whether or not the Civil RICO language needs to be modified, clarified or left unchanged.

Against this backdrop of speculation and conjecture, respondents then go on to assert that this Court has declined to review "even important questions of state in the expectation of congressional or executive action. *See* Note, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making,* 16 Va. J. Int'l L. 903, 922-23 (1976)." (Respondents' Brief, pp. 8-9). The Virginia Journal of International Law says the direct opposite for what it is cited:

> [T]he relative inflexibility of any statutory approach and the confusion which resulted from the Court's inaction support the position that an earlier Supreme Court resolution of the problem would have been preferable to the belated congressional action. In any event, the Court has never indicated that its certiorari decisions were dictated by a deference to the legislative branch. The decision in *Dunhill,* for example, evidenced disagreement about the sovereign immunity doctrine but no desire to leave the resolution of that disagreement to Congress.

Note, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making,* 16 Va. J. Int'l L. 903, 922-23 (1976) (footnote omitted).

2. Respondents have also interlarded their brief with sporadic commentary that this Court should deny Certiorari because the RICO claim can be arbitrated. The arbitrability of a RICO claim is not a question presented in our Petition for Certiorari. Furthermore, in throwing up their smokescreen, candor should have at least com-

pelled the respondents to disclose to the Court that on October 1, 1984, the Court of Appeals for the Second Circuit, in *S. A. Mineracao Da Trindade-Samitri* v. *Utah International, Inc.*, Nos. 1370, 1504, squarely indicated that a RICO claim is not arbitrable. Decisions to preclude arbitration based on public concern have come in a wide variety of other areas: antitrust claims (*see, e.g., American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968); *Hunt* v. *Mobil Oil Corp.*, 444 F. Supp. 68, 69 (S.D.N.Y. 1977)); patent validity and infringement claims (*see, e.g., Hanes Corp.* v. *Millard*, 531 F.2d 585, 593-95 (D.C. Cir. 1976); *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55, 62-63 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 381 F. Supp. 1057, 1061-62 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir. 1975), *cert. denied*, 423 U.S. 913 (1975)); and civil rights discrimination cases (*see, e.g., Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-59 (1974); *Wertheim & Co.* v. *Halpert*, 48 N.Y.2d 681, 683 (1979)). *See generally*, Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481 (1981).

Given the broad purposes of RICO and that the enforcement of civil RICO involves concerns touching upon vital national interests, it cannot be seriously argued that Congress intended to entrust the enforcement of RICO to arbitrators. The overriding public policy in favor of judicial resolution of RICO claims makes unnecessary any inquiry into whether the parties had actually agreed to arbitrate the fraudulent scheme underlying the RICO count. We have made these observations solely for the purpose of dispelling the confusion which respondents have sought to generate with their tangential reference to the irrelevant subject of arbitration.

3. Respondents persist in seeking to trade upon the Justice Department's RICO guidelines for criminal prose-

cution. (Respondents' Brief, p. 15). As we did below, we once again point out that these guidelines create no safety hatch for respondents; they do not construe the RICO statute. They were not published under any regulatory authority. They have no force of law, nor could a defendant rely on them to preclude prosecution. And, capping everything, they "provide only internal Department of Justice Guidelines. They are not intended, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law *by any party in any matter civil* or criminal." (Appellees' Brief below, Addendum B, pp. B-1 to B-2) (emphasis supplied). And, if more need be said, RICO's private remedy is specifically designed as an additional enforcement tool—to supplement its criminal enforcement provisions. To use these guidelines to limit actions brought by private attorneys-general would actually defeat one of the major purposes of the civil RICO remedy.

All in all, respondents' brief, and their headlong flight from the Petitioners' reasons for granting the Writ, have corroborated the compelling need for this Court to review the basis for the judgment below, which has made civil RICO an empty shell.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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November 30, 1984